Supreme Court, U.S.
FILED
FEB 11 1985
STEVAS
CLERK

No. 84-824

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM S. BILENKY*
General Counsel

PAUL SEXTON
Associate General Counsel

SIDNEY J. WHITE
Associate General Counsel

Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301-8153
(904) 488-7464

February 11, 1985 **Counsel of Record*

THE CASILLAS PRESS, INC. 1717 K Street N.W. • Washington, D.C. • 223-1220

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

BASIS FOR SUPPLEMENTAL BRIEF 1

SUPPLEMENTAL AGREEMENT 2

CONCLUSION 4

TABLE OF AUTHORITIES

The Communications Act of 1934
47 U.S.C. section 202 2

Miscellaneous

H.R. 151, 99th Cong., 1st Sess. (1985) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-824

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BASIS FOR SUPPLEMENTAL BRIEF

This Supplemental Brief is filed pursuant to Supreme Court Rule 22.6. Its purpose is to apprise the Court of an order of the Federal Communications Commission which was issued subsequent to the filing of the original Petition for Writ of Certiorari in this case. Such actions are relevant and have a direct bearing on the arguments set forth by the Florida Public Service Commission in its original Petition.

On November 2, 1985, the Florida Public Service Commission filed its original Petition for a Writ of Certiorari

with this Honorable Court. That Petition seeks the Writ for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the actions of the Federal Communications Commission generally known as its *Access Charge Decision.* 93 F.C.C.2d 241 (*Report and Order*); 48 Fed. Reg. 42984 (1983) (*Order on Reconsideration*); and 49 Fed. Reg. 7810 (1984) (*Order on Further Reconsideration*). Respondents, Federal Communications Commission and United States of America, filed their Brief in Opposition on January 9, 1985. In that Brief, the Respondents referred to an unpublished decision by the Federal Communications Commission that was not yet "formally released." That decision was actually "formally released" on December 28, 1984.

SUPPLEMENTAL ARGUMENT

In its original Petition, the Florida Public Service Commission argues that the *Access Charge Decision* fosters unlawful discrimination in rates in violation of 47 U.S.C. section 202. (84-824 Pet. 17-21). In its *Brief for the Federal Respondents in Opposition,* the Respondents claim that "Florida's contention with respect to averaging of rates is, in any event premature." (Nos. 84-816, 84-824, and 84-856, Brief at 7). The Respondents contend that the *Access Charge Decision* did not prescribe rates, but rather only prescribed a framework for the recovery of a large part of the interstate share of the cost of local exchange facilities.

The Respondent's argument is disingenuous, for the Commission's *Access Charge Decision* did prescribe rates for multi-line business customers which have been implemented. The already adopted policy decision of the

Commission to implement a flat rate customer access line charge (CALC) has now come to fruition for residential and single line business customers. The Federal Communications Commission's December 28, 1984 Order implemented the flat CALC for all residential and single line business customers. This action substantiates the fact that the rates to be charged and applied under the *Access Charge Decision* are unrelated to any cost consideration and are patently unlawful under the Communications Act of 1934.

The Federal Communications Commission is strictly adhering to its established policy of flat access charges and rates have been imposed without regard to cost of service. Nothing in the Respondent's Brief in Opposition, nor the Federal Communications Commission's December 28, 1984 Order shows any hint of a concern about *ever* reconciling flat CALC to cost of service. Arguments that the Commission has not yet decided on its course of action with respect to the appropriate access charge rates are without merit in light of the Commission's action setting *exactly* the type of rates proposed in the *Access Charge Decision*. The Federal Communications Commission's illegal policy has been adopted and implemented. The flat CALC is in place. It is ripe for review.[1]

[1]The Respondents also cite to the December 28, 1984 Order to demonstrate that the Federal Communications Commission is actually sensitive to the threat to universal service that it has created. This is simply an effort to embellish the *Access Charge Decision* with the merits of a subsequent order while arguing that the defects of that order must be ignored. In fact, the "lifeline" assistance for low income families that the Federal Communications Commission has adopted is simply another foray by the Federal Communications Commission into the realm of intrastate ratemaking. The Federal Communications Commission will provide no assistance at all unless the states acquiesce to burdening intrastate rates with 50% of the cost of the program, a cost cause *solely* by Federal Communications Commission ac-

The Florida Public Service Commission has consistently opposed the imposition of any flat rate access charge, and the fact that the Commission has now decided to implement a one dollar CALC Instead of a two dollar CALC does not in any way effect the basic thrust of our argument against the rate structure imposed and its attendant discriminatory and unlawful effects on customers and state commissions alike.

CONCLUSION

The Federal Communications Commission has adopted a discriminatory flat customer access line charge without regard to the cost of service. This flat charge endangers the continued availability of universal telephone service.

Respectfully submitted,

WILLIAM S. BILENKY
General Counsel
(Counsel of Record)

PAUL SEXTON
Associate General Counsel

SIDNEY J. WHITE
Associate General Counsel

Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301-8153
(904) 488-7464

February 11, 1985

---

tion. Lifeline rates are social considerations to be made by legislatures and not administrative fiat. See House Bill introduced by Congressman Micky Leland; H.R. 151, 99th Cong., 1st Sess. (1985).